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No. 91-1122

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,
Debtors,

ANN MOSTOLLER, TRUSTEE,
Cross-Respondent,

vs.

PATRICK F. MESSING,
Cross-Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, establishes an exemption under federal law available to the debtor under 11 U.S.C. § 522(b)(2)(A) of the Bankruptcy Code?

LIST OF PARTIES

The cross-petitioner in this action is Patrick F. Messing, debtor. The cross-respondent is Ann Mostoller, Trustee.

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No. 91-1122

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IN RE: PATRICK F. MESSING, AND NORA B. MESSING,

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Cross-Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

The cross-petitioner, Patrick F. Messing, debtor, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the opinion and order

of that court entered on August 22, 1991, as amended by the opinion and order entered on September 24, 1991.

OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the Eastern District of Tennessee is reported at 114 B.R. 541 (Bankr. E.D. Tenn. 1990). The opinion of the United States District Court for the Eastern District of Tennessee and the opinion of the United States Court of Appeals for the Sixth Circuit are not reported. The reports of opinions are reprinted in the original petition for writ of certiorari filed by Ann Mostoller, Trustee, and are thus not reprinted herein pursuant to Sup. Ct. R. 12.3.

STATEMENT OF JURISDICTION

The opinion of the Sixth Circuit was filed on September 24, 1991. A petition for rehearing and suggestion for rehearing *en banc* was denied by an order filed October 10, 1991. The Cross-respondent, Ann Mostoller, Trustee, filed an original petition for a writ of certiorari in this Court on January 8, 1992, and the original petition was served upon and received by cross-petitioner on January 10, 1992. This cross-petition is filed pursuant to Sup. Ct. R. 12.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

Pursuant to Sup. Ct. R. 14.1(f), the following statutes cited herein are set forth in Appendix A at pages 1a-4a.

11 U.S.C. § 522(b)(2)(A); 11 U.S.C. § 541(c)(1)(2); 26 U.S.C. § 401(a)(13); 26 C.F.R. § 1.401(a)-13; and 29 U.S.C. § 1056(d).

STATEMENT OF THE CASE

The debtor filed a petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Tennessee on July 12, 1989. In the bankruptcy proceeding, the debtor claimed as an exemption his interest in an ERISA-qualified pension plan in the amount of six thousand three hundred sixty-five dollars and forty-five cents ($6,365.45).

The debtor asserted that ERISA and Internal Revenue Code § 401(a)(13) established an exemption under "Federal law" which was available to him in bankruptcy pursuant to 11 U.S.C. § 522(b)(2)(A). *In re Messing,* 114 B.R. 541, 545 (Bankr. E.D. Tenn. 1990).

The Trustee objected to the debtor's exemption on the ground that ERISA did not provide an exemption under nonbankruptcy federal law. *Id.* at 542. The issues having been joined in an adversary proceeding, the parties stipulated the following pertinent facts:

> 1. The debtor is a beneficiary of a pension benefit plan (Plan) established by his employer under § 401(k) of the Internal Revenue Code (IRC) (26 U.S.C.A. § 401(k) (West Supp. 1990)).
>
> 2. The Plan is an ERISA-qualified plan, qualifying under IRC § 401(a) (26 U.S.C.A. § 401(a) (West Supp. 1990)).
>
> 3. The Plan contains the anti-assignment and anti-alienation provisions required by ERISA § 206(d) (29 U.S.C.A. § 1056(d) (West Supp. 1990)) and IRC § 401(a)(13) (26 U.S.C.A. § 401(a)(13) (West Supp. 1990)).

> 4. The debtor's interest in the Plan on July 12, 1989, the date he and his wife filed their joint petition under Chapter 7, was $6,365.45.
>
> 5. On the date his bankruptcy petition was filed, the debtor was thirty-one years old, employed by J.B.F. Associates, Inc., was not receiving benefits under the Plan, and had never made or received any withdrawals or distribution from the Plan.

In re Messing, 114 B.R. 541, 542.

The bankruptcy court allowed the exemption, holding that ERISA § 206(d) established a nonbankruptcy federal exemption available to the debtor under Bankruptcy Code § 522(b)(2)(A). *Id.* at 550. The Trustee appealed to the district court and the district court reversed the judgment of the bankruptcy court, holding that the debtor was not entitled to claim an exemption pursuant to 11 U.S.C. § 522(b)(2)(A), in the proceeds of his ERISA-qualified pension benefit plan.

The debtor appealed the decision of the district court denying the claim of exemption to the Sixth Circuit. During the pendency of the appeal, the Sixth Circuit filed its opinion in the case of *In re Lucas*, 924 F.2d 597 (6th Cir. 1991), holding that a debtor's ERISA-qualified pension benefits were excluded from the debtor's estate pursuant to 11 U.S.C. § 541(c)(2) and 29 U.S.C. § 1056(d). The debtor raised two contentions on appeal. The first was that the Sixth Circuit's opinion in *In re Lucas*, was dispositive of the appeal because property excluded from the estate is not subject to the jurisdictional reach of the bankruptcy trustee. In the alternative, the debtor suggested that even if ERISA benefits were properly considered part of the debtor's estate, the pension benefits were exempt from a trustee's reach under § 1056(d) of ERISA

and § 522(b)(2)(A) of the Bankruptcy Code.

The Sixth Circuit held that the decision in *In re Lucas* was dispositive of the appeal and thus, pretermitted the issue of whether ERISA provided an exemption of pension benefits from a debtor's estate.

REASONS FOR GRANTING THE WRIT

The original petition for writ of certiorari filed by the Trustee seeks review of the issue of whether ERISA-qualified pension benefits may be excluded from a bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). The principal reason asserted by the Trustee for seeking review of the exclusion issue was the split, at that time, of authority between the Fifth, Eighth, Ninth and Eleventh Circuits, which have held that ERISA-qualified pension benefits are included in a debtor's estate, and the Fourth and Sixth Circuits, which have held that such benefits are excluded from the estate because of the "plain meaning" of 11 U.S.C. § 541(c)(2).

Since the filing of the original petition, the Third and Tenth Circuits have filed opinions in the cases of *Velis v. Kardonis,* No. 91-5084, 1991 U.S. App. Lexis 26809 (3rd Cir. Nov. 1991) and *Gladwell v. Harline,* No. 90-4157, 1991 U.S. App. Lexis 28540 (10th Cir. 1991), consistent with those of the Fourth and Sixth Circuits. Moreover, the Ninth Circuit recently affirmed its prior decision rejecting the exclusion argument. *Reed v. Drummond (In re Reed),* No. 90-15874,1991 U.S. App. Lexis 28739 (9th Cir. Dec. 1991). The circuit courts of appeals are now evenly divided on the exclusion issue, and, assuming this Court grants review of the original petition, the debtor maintains that a full and final resolution of a debtor's right to ERISA-qualified pension benefits cannot be concluded without consideration of the issue of exemption of pension benefits under 11 U.S.C. § 522(b)(2)(A).

As argued in the debtor's brief in opposition to a petition

for a writ of certiorari, the debtor maintains that the Court should construe 29 U.S.C. § 1056(d) and 11 U.S.C. § 541(c)(2) harmoniously to exclude ERISA *pension* benefit plans from bankruptcy estates and, on this ground, affirm the decision of the Sixth Circuit. However, if the Court concludes that ERISA benefit plans are determined to be included in property of the bankruptcy estate, then the debtor insists that he should be allowed to exempt his ERISA pension benefits under 11 U.S.C. § 522 (b)(2)(A).

I.

DIVISION AMONG VARIOUS COURTS

Numerous courts have considered the application of 11 U.S.C. § 522(b)(2)(A) and the Fifth, Eighth, Ninth and Eleventh Circuit Courts of Appeals have concluded that the anti-alienation and anti-assignment language of ERISA does not create a bankruptcy federal exemption. *In re Daniel,* 771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied.* 475 U.S. 1016 (1986); *In re Lichstrahl,* 750 F.2d 1488, 1491 (11th Cir. 1985); *In re Graham,* 726 F.2d 1268, 1274 (8th Cir. 1984); *Matter of Goff,* 706 F.2d 574, 585 (5th Cir. 1983) and *In re Turpin,* 644 F.2d 472, 474 n.1 (5th Cir. 1981) (dicta). Recently, the Ninth Circuit reaffirmed its rejection of the exemption issue in *Reed v. Drummond* (*In re Reed*), No. 90-15874, 1991 U.S. App. Lexis 28739 (9th Cir. Dec. 1991). In addition, the vast majority of bankruptcy courts have concluded that ERISA does not provide an exemption under federal law.

The courts rejecting the exemption argument have looked to the legislative history and the commentary accommpanying Bankruptcy Code § 522(b)(2)(A) and noted that ERISA was not included in a list of other nonbankruptcy federal exemptions. These courts have held that the omission was indicative of congressional intent that ERISA did not establish an exemption for bankruptcy

purposes under federal law. The cornerstone for this proposition was the dicta found in *In re Goff*, 706 F.2d 574, 585 (5th Cir. 1983).

However, the Bankruptcy Court in this case, consistent with compelling logic and the trend of authority, concluded that the ". . . clear language of § 522(b)(2)(A) belies such an interpretation." *In re Messing*, 114 B.R. 541, 547 (Bankr. E.D. Tenn. 1990). *See also, In re Hinshaw*, 23 B.R. 233 (Bankr. D. Kan. 1982); *In re Burns*, 108 B.R. 308 (Bankr. W.D. Okla. 1989) *(en banc); In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989), discussed at p. 15 *infra; In re Felts*, 114 B.R. 131 (Bankr. W.D. Tex. 1990); *In re Martinez*, 107 B.R. 378 (Bkrtcy. S.D. Fla. 1989) and *In re Suarez*, 127 B.R. 73 (Bkrtcy. S.D. Fla. 1991).

The leading case expressing the minority view is *In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989) wherein the court pointed out that the Fifth Circuit broke a cardinal rule of statutory construction when it relied heavily on the illustrative list and the legislative history to support this conclusion that Congress did not intend to include ERISA plans under the federal law exemption. The court explained:

> Where the meaning of a statute is clear on its face, however, it is improper to resort to legislative history to interpret the statute. . .*Goff* concedes that § 522(b)(2)(A)'s legislative history is sparse and that it provides "no further insight into which other, if any, federal laws were intended to be brought within this provision." As *Goff's* interpretation derives from its heavy reliance on the illustrative list in the legislative hsitory, its logic must be rejected in the face of the statute, which is clear and unambiguous on its face. . .[I]f resort is to be made to the legislative history, then

> interpretation of that history must be disciplined. It is a non sequitur to say that the failure to include something on an illustrative list is probative of an intent to exclude it from that list. Illustrative lists (in contrast to exhaustive lists) by their nature preclude the possibility of overlooking" a statute of the type already listed. *Goff* doubted that Congress meant to include ERISA when other "significantly less comprehensive and less well-known statutes" were included in the list but that observation simply misses the point. The statute has long adopted an attitude of neutrality toward the nature and extent of a given exemption leaving that issue to be controlled by the statute which confers exemption and the case law which construes it. . . .Against this backdrop, the legislative history cannot be read to be anything more than what it purports to be — an "illustrative" list which merely indicates what might qualify for exemption under § 522(b)(2)(A). It is up to the courts to determine whether a given statute confers an exemption without resort to bankruptcy law, much less resort to its legislative history.

In re Komet, 104 B.R. at 814-815. The Supreme Court has taken the same approach in cases under the Bankruptcy Code ". . .for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

While conceding that the Bankruptcy Code was generally intended to broaden the definition of "property of the estate," the court in *Komet*, rejected the conclusion in *Goff*, that Congress intended to limit an exemption of pension funds. Bankruptcy Code

§§ 541 and 522 serve two (2) very distinct purposes as pointed out in *In re Komet*:

> In giving debtors a choice of exemption schemes ("existing" or "generic"), Congress certainly did not intend to put debtors to a Hobson's choice. The generic exemptions alternative represents a complete, free-standing exemption scheme, which provides not only for such things as cars, clothes and homestead (otherwise governed by state exemption law) but also for retirement benefits. . . .After all, debtors who might chose the generic exemptions must forego the existing exemptions, including those to retirement benefits available under "other federal law." Debtors should not be penalized for making bad choice nor does anything in the statute or the legislative history suggest otherwise.

In re Komet, 104 B.R. at 812-813.

Finally, the court in *Komet* rejected the conclusion in *Goff*, that the Bankruptcy Code overruled ERISA.

> The proper analysis is to determine whether the two statutes can be construed so as to avoid any conflict, and if such a way cannot be found, then decide upon a resolution which would do the most to serve the Congressional intent "be impressed in both statutes and will least undercut the intent as expressed in either one."

In re Komet, 104 B.R. at 815.

Thus, if a debtor chooses the existing exemption scheme under

Bankruptcy Code § 522(b)(2)(A) rather than the generic exemption scheme as set forth in Bankruptcy Code § 522(d), such a debtor has a right to claim his pension assets as exempt property under "other federal law," such as ERISA's anti-alienation provision found in 11 U.S.C. § 1056(d).

II.

THE EXEMPTION ISSUE AFFECTS THOUSANDS OF DEBTORS AND CREDITORS AND SIGNIFICANTLY AFFECTS THE ADMINISTRATION OF THE BANKRUPTCY CODE.

The same argument advanced by the petitioner in her original petition regarding the number of bankruptcy filings and the amount of contributions to pension plans apply with the same force here. Furthermore, debtors should not be denied exemption of ERISA-qualified pension benefits in one district, but allowed to exempt the same benefits in another. Such a result is contrary to the congressional objective of providing a uniform system of bankruptcy laws, P.L. 95-598, 95 Stat. 2549, and of protecting the "continued well-being and security of millions of employees and their dependents . . . . " 29 U.S.C § 1001.

III.

CONGRESS INTENDED TO INCLUDE ERISA-QUALIFIED PENSION BENEFITS AS PROPERTY OF THE ESTATE UNDER 11 U.S.C. § 541(c)(2) AND TO PERMIT EXEMPTION OF SUCH BENEFITS UNDER 11 U.S.C. § 522(b).

The Trustee has cogently argued that through the broad sweep of § 541, Congress intended to include ERISA-qualified pension benefits within the definition of property of the estate. The Trustee points to 11 U.S.C. § 522(d)(10)(E), the ERISA-qualified pension benefit exemption under the federal list of exemptions for states which have not opted to use state law, and concludes that Congress intended to deal with ERISA as a matter of exemption.

Using these same arguments, your cross-petitioner submits that Congress also intended and expressly provided that citizens of states which have opted out of the federal list of exemptions pursuant to 11 U.S.C. § 522(b)(1) are entitled to claim not only state law exemptions, but also exemptions under nonbankruptcy, federal law. Bankruptcy Code, § 522(b)(2)(A) provides:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate . . . (2)(A) Any property that is exempt under Federal law, other than subsection (d) of this section, or state or local law . . . .

The only remaining question is whether ERISA is such a federal law providing an exemption for qualified pension benefits.

Recently, this Court in the case of *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 829-831 (1988), observed that ERISA barred the alienation or assignment of

pension benefits and thus in effect exempted ERISA benefits from state enforcement mechanisms to prevent those benefits from being paid to plan participants. That ERISA provides a federal law exemption is also implicit in *Guidry v. Sheet Metal Workers National Pension Fund,* 493 U.S. 365 (1990), where this Court said:

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief from the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Id. at 372. The Court refused to impose a constructive trust upon, and prohibited execution by garnishment of funds in an ERISA-qualified pension plan. *Id.* at 376.

Additionally, the Secretary of the Treasury pursuant to 29 U.S.C. § 1202(c), issued Internal Revenue Service Regulation § 1.401(a)-13, providing that ERISA-qualified pension benefits " . . . may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 C.F.R. § 1.401(a)-13 (1979). This regulation has been held to be legislative rather than interpretive and should be controlling authority. *General Motors Corporation v. Buha,* 623 F.2d 455, 459-463 (6th Cir. 1980). The Sixth Circuit concluded in the *General Motors* case that pension plan benefits were not subject to garnishment. *Id.* at 463.

Since ERISA-qualified pension plan benefits have been protected or exempted from the reach of creditors in cases involving voluntary or involuntary transfers, congressional intent and logic compel the conclusion that ERISA provides a federal

law exemption for pension benefits which may be exempted from the reach of a bankruptcy trustee.

CONCLUSION

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTES

11 U.S.C § 522(b)(2)(A):

§ 522. Exemptions

* * *

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either —

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; . . .

11 U.S.C. § 541(c)(1)(2):

§ 541. Property of the estate

* * *

(1) Except as provided in paragraph (2) of this

subsection, an interest of the debtor in property becomes property of the estate . . .

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

26 C.F.R. § 1.401(a)-13:

§ 1.401. Assignment or alienation of benefits.

(b) *No assignment or alienation—(1) General rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, *assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.* (emphasis added)

26 U.S.C. § 401(a)(13)

§ 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification.— A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

Appendix A

(13) Assignment and alienation.—

(A) In general.— A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders.— Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

Appendix A

29 U.S.C. § 1056(d)(1):

§ 1056. Form and payment of benefits

* * *

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.